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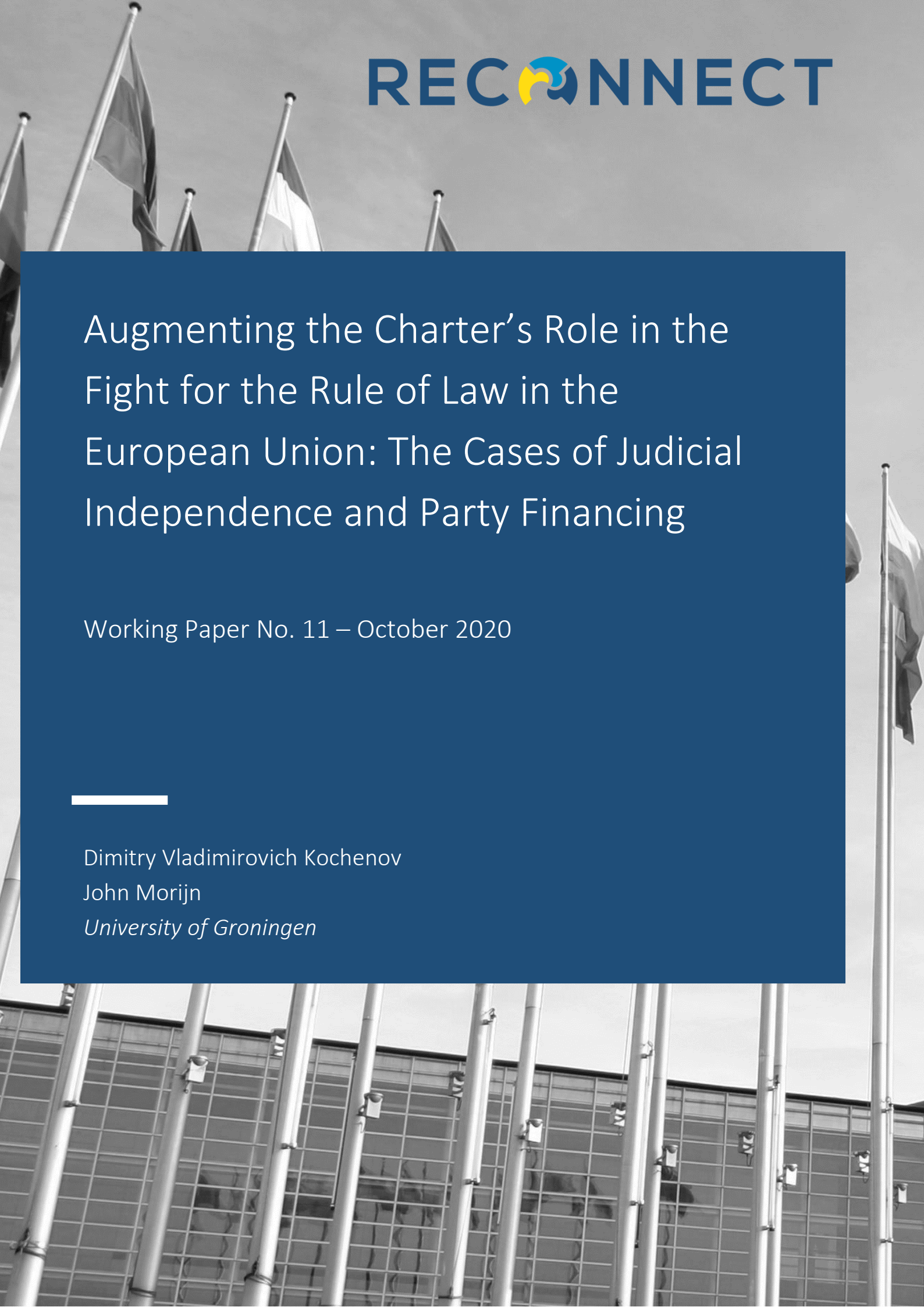

RECONNECT

Augmenting the Charter's Role in the Fight for the Rule of Law in the European Union: The Cases of Judicial Independence and Party Financing

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Augmenting the Charter's Role in the Fight for the Rule of Law in the European Union: The Cases of Judicial Independence and Party Financing

Dimitry Vladimirovich Kochenov and John Morijn

Abstract

This article focuses on the difficult relationship between the fight for the Rule of Law in the EU and the EU Charter of Fundamental Rights. It outlines the connections between the two and then focuses on when and how the Charter could and should play a more significant role in upholding the Rule of Law in EU Member States and at the supranational level itself. Turning first to the Member State-level Rule of Law breakdowns, we demonstrate that the Charter has either been missing in the shadow of Article 19(1) TEU or threatening to undermine the fight for the Rule of Law in the instances when the principle of judicial independence was misrepresented as a right via Article 47 CFR standing alone. Turning then to the supranational level Rule of Law issues, we show that the Charter has so far been applied to a problematically limited extent. The Charter could and should play a much more significant role as there is no doubt about its applicability. This is particularly clear when turning to party-financing at EU-level, which offers a case in point to show how taking the Charter seriously could make a difference in protecting the Rule of Law in the EU.

Keywords

Article 7 TEU proceedings; Charter of Fundamental Rights of the European Union; judicial independence; party financing; rule of law

Authors

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Contents

1. Introduction

Faced with democratic and Rule of Law backsliding in several Member States,[1] which finds no effective opposition on the ground in the politically captured states,[2] and faced with a lethargic, if not counter-productive response from other EU Institutions,[3] it has fallen mostly to the Court of Justice to step in. In a giant leap for the very essence of European constitutionalism it has mobilised the key values on which the Union and the Member States are built to embark on the articulation of a comprehensive, coherent, and effective system of Rule of Law protection at all the levels of governance in Europe. In doing so the Court has used the values of EU law and the alliance between the national and supranational courts as a means of protection.[4] Strikingly, as one would have expected a central role for it, the Charter of Fundamental Rights of the EU (Charter, CFR) has played little more than an ambiguous role in this process.

Indeed, Rule of Law enforcement and the prevention of democratic backsliding in the EU on the one hand, and the judicial and policy application of the legally binding Charter at EU and

[1] L Pech and KL Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 CYELS 3. Cf. e.g. W Sadurski, *Poland's Constitutional Breakdown* (OUP 2019); M Smith, 'Staring into the abyss: A crisis of the Rule of Law in the EU' (2019) 25 ELJ 563; K Kovács and KL Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union' in PH Solomon Jr and K Gadowska (eds), *Legal Change in Post-Communist States: Progress, Reversions, Explanations* (Ibidem Verlag 2019) 55. A number of scholarly volumes on these developments in the EU is available. E.g. A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017); T Konstadinides, *The Rule of Law in the European Union – The Internal Dimension* (Hart Publishing 2017); C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016); W Schröder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016); A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015). Cf., for the analyses of the ongoing academic debate, O Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) 11 HJRL 133; M Bonelli, 'From a Community of Law to a Union of Values?' (2017) 13 EUConst 793.

[2] P Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) 15 EUConst 518; D Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56 CMLRev 623; A Sajó, 'The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies' (2019) 11 HJRL 371; P Blokker, 'Populist Constitutionalism and Meaningful Popular Engagement' (2018) The Foundation for Law, Justice and Society Policy Brief (Centre for Socio-Legal Studies and Wolfson College, University of Oxford); KL Scheppele, 'The Social Lives of Constitutions', in P Blokker and C Thornhill (eds), *Sociological Constitutionalism* (CUP 2017) 35.

[3] See the *JCMS* special Issue edited by D Kochenov, A Magen and L Pech (eds), 'The Great Rule of Law Debate in the EU' (2016) 54 JCMS 1043. Cf. e.g. A Schout and M Luining, 'The missing dimension in Rule of Law policy From EU policies to multilevel capacity building' (Clingendael Instituut Report 12 January 2018).

[4] There is already quite some literature on these very recent developments, e.g. KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values are Law, after All' (2020) 38 YEL (forthcoming); P Van Elsuwege and F Grimmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 EUConst 8; C Rizcallah and V Davio, 'L'article 19 du Traité sur l'Union européenne: sesame de l'Union de droit' (2020) QRHR 122, 156; G Kelepouri, 'Revisiting the Rule of Law in the European Context: The CJEU's Recent Narrative in the Limelight' (2020) European Politeia 71; D Kochenov and P Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 EYCL 243; K Lenaerts, 'Our Judicial Independence and the Quest for National, Supranational and Transnational Justice' in G Sevik, M-J Clifton, T Haas, L Lourenço and K Schwiesow (eds), *The Art of Judicial Reasoning:* Festschrift *in Honour of Carl Baudenbacher* (Springer 2019) 155; S Adam and P Van Elsuwege, 'L'exigence d'indépendance du juge, paradigm de l'Union européenne comme union de droit' (2018) 9 JDE 334; L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case' (2018) 55 CMLRev 1836.

Member State level[5] on the other, although so evidently connected at a theoretical level and so obvious in their potential for synergy in upholding EU values as the Union's very foundations, in practice have often felt like ships passing in the night. How sustainable is this situation? Could and should the Charter play a more significant role in the context of the on-going fight for protecting the Rule of Law in the Member States and at the EU-level itself? And if so, when and how? The task of this article is to analyse the failures and achievements of the Charter in the context of the Rule of Law backsliding to date. To this end, it outlines the trajectory of institutional responses to the Rule of Law crisis at the Member State and EU level. The emphasis is on the surprisingly limited role that the Charter has played until recently.

On the one hand, we argue, in relation to dealing with Member State-level Rule of Law backsliding there have been some important openings that the Court has created in its recent Rule of Law related case law on judicial independence. As primarily an instrument tailored to ensure effective rights protection, the Charter's judicial effectiveness in this context is somewhat limited, however. Instances of Member-State level Rule of Law backsliding cannot, on many occasions, be effectively reconceptualised as rights violations. Here the Charter unquestionably requires firmer consideration but cannot be the only ingredient of effective protective action. On the other hand, even if these have not been properly exploited yet, the article identifies some clear opportunities for the use of the Charter to defend the Rule of Law at the EU-level itself. A particular emphasis is put on the party financing rules at EU level, which should operate, we argue, in full compliance with the provisions of the Charter. The result will be a clearer and more coherent legal basis for limiting the funding of the European party groups harbouring the Member State political forces responsible for the deterioration of the Rule of Law.

2. EU Rule of Law Enforcement and the Charter: Where the Two Innovations Meet

When, on 1 December 2009, the Charter of Fundamental Rights of the European Union became legally binding as part of the entry into force of the Lisbon Treaty – and notwithstanding the earlier scholarly criticism[6] – there was much anticipation that sooner rather than later it would make a real difference to human rights protection in the Union legal order. Besides the binding Charter, the post-Lisbon legal system of the Union boasted another important innovation. A systemic codification of the 'values of the Union' in what became Article 2 TEU,[7] now distinct from 'principles', showcased the Union's ability to build on its history of embracing fundamental principles and their promotion, in particular, in the pre-accession context,[8] as well

[5] J Morijn, 'Post-Lisbon civil rights protection by the EU's political institutions' in S de Vries, H de Waele, and M-P Granger (eds), *Civil rights and EU Citizenship: Challenges at the Crossroads of the European, National and Private Spheres* (Edward Elgar Publishing 2018) 14; J Morijn, 'Kissing awake a sleeping beauty? The Charter of Fundamental Rights in EU and Member States' policy practice' in V Kosta, N Skoutaris and V Tzevelekos (eds), *EU accession to the ECHR*, (Hart Publishing 2014) 123.

[6] A Knook, 'The Court, the Charter, and the vertical division of powers in the European Union' (2005) 42 CMLR 367.

[7] M Klamert and D Kochenov, 'Article 2' in M Kellerbauer, M Klamert and J Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (OUP 2019); L Pech, 'The Rule of Law as a Constitutional Principle' in W Schröder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016).

[8] M Maresceau, 'Quelques réflexions sur l'application des principes fondamentaux dans la stratégie d'adhésion de l'UE' in J Raux (ed), *Le droit de l'Union européenne en principes: Liber amicorum en l'honneur de Jean Raux* (LGDJ

as more generally in external relations.[9] Wojciech Sadurski is absolutely right: the Union's move to embrace Central and Eastern Europe resulted in a deep upgrade of the Union's constitutionalism.[10]

Combining the two innovations – the Charter and the codified 'values' – was not at all at the top of the scholarly agenda. Indeed, once one seriously spoke of the substance of the 'values' and principles, the Charter was not really viewed as amongst the most relevant enforcement tools. Instead, all eyes turned to Article 7 TEU, revamped after the Austrian FPÖ crisis[11] and offering some *political* rather than strictly legal means to enforce the beautiful proclamations placed, as we have seen, seemingly outside of the scope of the *acquis*.[12] This is to say – also outside the scope of the Charter. At the same time, frankly, very few seriously considered that Article 7 TEU proceedings on enforcing Member States' Rule of Law commitments would ever require practical application at all:[13] the possible Rule of Law and democracy problems were not considered as a serious issue in the post-enlargement euphoria.

Fine-tuning the Charter to deal with EU value problems was seemingly not considered relevant. Nor was it ever seriously conceptualised as of practical necessity. Indeed, EU legal scholars and practitioners almost without exception approached their object of study as a club-of-stable-liberal-democracies and based the development of their field on that assumption. The EU itself was seen as a 'democracy'[14] and even 'a republic'.[15] For that reason a focus on the EU's own possible role in defending and enforcing the Rule of Law, let alone the possible role in that for the Charter, was often seen as a somewhat obscure and vaguely alarmist obsession. The warnings sounded in the past – including Judge Pescatore's concerns about the ability of the

2006) 69; M Maresceau, 'The EU Pre-Accession Strategies: A Political and Legal Analysis' in M Maresceau and E Lannon (eds), *EU's Enlargement and Mediterranean Strategies: A Comparative Analysis* (Palgrave & Basingstoke 2001); D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).

[9] L Pech, 'Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013).

[10] W Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012)

[11] W Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 CJEL 385. Cf. GN Toggenburg, 'La crisi austriaca: delicati equilibrismi sospesi tra molte dimensioni' (2001) 2 DPCE 735; K Lachmayer, 'Questioning the Basic Values – Austria and Jörg Haider' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017).

[12] D Kochenov, 'The Acquis and Its Principles: The Enforcement of the 'Law' Versus the Enforcement of 'Values' in the EU' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017).

[13] See, for wonderful analyses, LFM Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017); G Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law* (EUI 2017); B Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (CUP 2016). Cf. D Kochenov, 'Article 7' in M Kellerbauer, M Klamert and J Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (OUP 2019) 88;

[14] For a skeptical account, see, JHH Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the EU* (CUP 2016).

[15] A von Bogdandy, 'The Prospect of a European Republic: What European Citizens are Voting on' (2005) 42 CMLRev 913.

British, once in, to stall the development of the Union – were not taken to heart.[16] In other words, just like Article 50 TEU on exiting the Union, Article 7 TEU was understood and expected to remain little more than part of the symbolic locking system of the Union legal order. The Charter's relevance is this context was universally regarded as of no possible value at all and thus remained largely unclear. Adam Łazowski has rightly referred to the instrument as a 'legal enigma'.[17]

3. Rule of Law Crisis and the Charter: Positive and Negative Developments

The Rule of Law is the essential element of EU law since the inception of the Union,[18] only to get a gradual articulation in practice[19] and in case-law[20] to emerge as one of the formally-recognised Union's values with the Lisbon amendments of the Treaties. While the original understanding of the EU's Rule of Law has been quite basic and circular,[21] essentially as 'bound by the law' – the on-going Rule of Law revolution[22] is responsible for re-making the principle along the lines of a substantive understanding: Rule of Law now requires not only that all of Union law itself be made and applied in strict accordance with the law – what has been formally recognised by the Court since *Les Verts*[23] It means too that substantive guarantees of judicial

[16] P Pescatore, *Le droit de l'intégration. Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés Européennes*, (AW Sijthoff 1972) 29:

> Aux nouveaux venus, […] il faut demander non seulement de définir leur position à l'égard des objectifs d'ores et déjà définis et consacrés par des engagements fermes. Il faut les interroger aussi sur leurs intentions en ce qui concerne les chances d'une evolution ultérieure vers l'union politique.

Cf., along the same lines, J-P Puissochet, *The Enlargement of the European Communities. A Commentary on the Treaty and the Acts Concerning the Accession of Denmark, Ireland and the United Kingdom* (AW Sijthoff 1975).

[17] A Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings' (2013) 14 *ERA Forum* 573.

[18] L Pech, 'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional principle of EU Law (2010) 6 EUConst 359.

[19] D Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8(10) EIoP 1.

[20] L Pech and J Grogan, 'The Meaning and Scope of EU Rule of Law' (2020) RECONNECT Working Paper no D 7.2; K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 CMLRev 1625.

[21] D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 YEL 82.

[22] L Pech and D Kochenov, 'Step by Step: Documenting the EU's Rule of Law Revolution' (2020) SIEPS Report (forthcoming).

[23] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166, [1986] ECR 1339. K Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' in M Poiares Maduro and L Azoulai (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 304; L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper Series No 4/2009; ML Fernández Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International 1999).

independence,[24] including strict irremovability standards,[25] apply to the national and supranational judges. It signifies, in addition, that such substantive guarantees are policed, if necessary relatively harshly[26] and with a rich palette of interim relief measures, which include *ex ante* restitutions in institutional structures,[27] by EU law.[28] Preliminary rulings from the judges fighting for their own independence play a crucial role in these developments.[29] In the cases where the references themselves happen to be found inadmissible, the Court always underlines the fundamental indispensable nature of judicial dialogue in the EU and the imperative requirements of judicial independence, making such dialogue possible.[30] The Union is learning its lessons.[31]

All this allowed the Union to emerge in an entirely new light. Not as a would-be constitutional system[32] based on the simple presumption of compliance with its stated Article 2 TEU values, especially the Rule of Law, the substance of which was, ultimately, for the Member States to determine.[33] But as a fusion of aspirational value-proclamations with the possibility of their strict substantive enforcement,[34] which was lacking both due to the perceived lack of *competence* and the perceived lack of clarity in terms of the *substance* of the values. Clarity is

[24] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, [2018] OJ C142/2; L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the AJSP Case' (2018) 55 CMLR 1827; S Adam and P Van Elsuwege, 'L'exigence d'indépendance du juge, paradigme de l'Union européenne comme Union de droit' [2018] JEL 334.

[25] E.g. Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, [2019] OJ C280/9; Case C-192/18 *Commission v. Poland (Independence of Ordinary Courts)* EU:C:2019:924, [2019] OJ C432/5.

[26] Case C-791/19 R *Order of the Court (Grand Chamber) in Commission v Poland (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2020:277, (8 April 2020).

[27] Case C-619/18 R, *Order of the Court (Grand Chamber) in Commission v. Poland (Independence of the Supreme Court)* EU:C:2018:1021, (17 December 2018).

[28] For a significant break-through in interim relief, see, most importantly, Case C-441/17 R, *Order of the Court (Grand Chamber) in Commission v. Poland (Białowieża forest)* EU:C:2017:877, (20 November 2017). Cf. P Wennerås, 'Saving a forest and the Rule of Law: Commission v Poland. Case C-441/17 R, Commission v Poland, Order of the Court (Grand Chamber) of 20 November 2017' (2019) 56 CMLRev 541.

[29] Joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others v Sąd Najwyższy* EU:C:2018:977, [2018] OJ C27/6.

[30] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* EU:C:2020:234, [2020] OJ C215/10.

[31] D Kochenov and P Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 EYCL 243, 274.

[32] See, the diverging perspectives by P Lindseth (minority view) and JHH Weiler (majority view): PL Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (OUP 2010); JHH Weiler, *The Constitution for Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (CUP 1999).

[33] D Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?' in M Adams, E Hirsch Ballin and A Meuwese (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (CUP 2017) 425.

[34] T von Danwitz, 'Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ' (2018) 21 PELJ 2; R Baratta, 'La communauté de valeurs dans l'ordre juridique de l'Union européenne' (2018) Rev Aff Eur 81; D Kochenov, 'The *Acquis* and Its Principles: The Enforcement of 'Law' versus the Enforcement of 'Values' in the European Union' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (OUP 2017) 8.

being articulated at both levels now.[35] Add to this reinforced *enforcement* possibilities and the picture of the new constitutionalism in the EU is complete.[36]

The Rule of Law crisis has allowed the judiciaries of the EU to shine, bringing inter-court dialogue to a vital new level and upgrading its substance.[37] At the core of this dialogue are also the fundamental principles of EU law, even those not confined in their entirety to the EU's scope of powers.[38] In particular this includes the independence and irremovability of the judiciary – interpreted by the ECJ as an EU-law principle and a vital element of the Rule of Law,[39] as opposed to merely issues of validity and the interpretation of EU law *per se*, however broadly conceived.[40] Such an interpretation – a spectacular innovation reshaping the constitutional system of the Union as we speak – has given voice to vertical concerns related to the defence of the independence of the Member State judiciaries,[41] as well as horizontal Rule of Law concerns, leading to a significant refinement of the principle of mutual recognition.[42] This has allowed the Court to learn from its past mistakes in dealing with assaults on the Rule of Law.[43] The presumption that the strict enforcement of the *acquis* is sufficient to guarantee adherence to the EU's values is clearly not valid any more.[44] Together with the endowment of Article 19(1)

[35] Cf. G Palombella, 'Beyond Legality—before Democracy: Rule of Law Caveats in the EU Two-Level System', in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).
[36] R Janse, *De renaissance van de Rechtsstaat* (Open Universiteit 2018).
[37] K Lenaerts, 'The Court of Justice and National Courts: A Dialogue Based on Mutual Trust and Judicial Independence' (Speech of President Lenaerts at the Polish Supreme Court 19 March 2018) <www.nsa.gov.pl> last accessed 1 May 2019); Editorial Comment, '2019 shaping up as a challenging year for the Union, not least as a community of values' (2019) 56 CMLR 3; M Dawson, 'Constitutional Dialogue between Courts and Legislatures in the European Union' (2013) 19(2) EPL 369, 371.
[38] For more on the shift of Art. 2 TEU principles from 'principles' to 'values' without undermining the essence of the former, see L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper Series No 4/2009.
[39] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, [2018] OJ C142/2; L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the AJSP Case' (2018) 55 CMLR 1827 (2018); A Ciampi, 'Can the EU Ensure Respect for the Rule of Law by Its Member States? The Case of Poland'(2018) 3 Osservatorio sulle fonti 1; S Adam and P Van Elsuwege, 'L'exigence d'indépendance du juge, paradigme de l'Union européenne comme Union de droit' [2018] JEL 334; M Krajewski, 'Associação sindical dos juízes portugueses: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 295.
[40] For a criticism of the state of the dialogical rule of law in the EU, *see e.g.* D Kochenov, 'Rule of Law as a Tool to Claim Supremacy' (2020) *RECONNECT WorkingPaper* No. 9.
[41] This allowed the national courts under threat to deploy the preliminary ruling procedure in an innovative way in order to guarantee the preservation of their own independence: S Biernat, M Kawczyńska, *Though this be Madness, yet there's Method in't: Pitting the Polish Constitutional Tribunal against the Luxembourg Court, 26 October 2018 VerfBlog,* at: <https://verfassungsblog.de/though-this-be-madness-yet-theres-method-int-the-application-of-the-prosecutor-general-to-the-polish-constitutional-tribunal-to-declare-the-preliminary-ruling-procedure-unconstitut/>; *Cf.* M Broberg, 'Preliminary References as a Means of Enforcement of EU Law' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017).
[42] E.g. Case C-216/18 *Minister for Justice and Equality v LM* EU:C:2018:586, [2018] OJ C328/22; C Rizcallah, 'Arrêt "LM": un risqué de violation du droit fundamental à un tribunal indépendant s'oppose-t-il à l'exécution d'un mandate d'arrêt européen?' [2018] JDE 348. Cf. K Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust' (2017) 54 CMLR 805.
[43] Case C-619/18 R *Order of the Vice-President of the Court in Commission v Poland* EU:C:2018:852, (19 October 2018) and Case C-619/18 R, *Order of the Court (Grand Chamber) in Commission v. Poland (Independence of the Supreme Court)* EU:C:2018:1021, (17 December 2018).
[44] D Kochenov, 'Why the Promotion of the Acquis is Not the Same as the Promotion of Democracy and What Can be Done in Order to Also Promote Democracy Instead of Just Promoting the *Acquis* - Some Lessons from the Fifth Enlargement' (2006) 2 Hanse LR 171.

TEU with a new significance, the on-going crisis of the Rule of Law has helped open a new chapter of European constitutionalism. We will discuss this in considerable detail below.

The Charter has initially played a very limited role in how these Rule of Law enforcement developments vis-à-vis Member States and the EU level itself have unfolded, and how responses have been shaped. Indeed, and remarkably, although a policy and an inter-institutional dialogue about it is nascent and has many promising aspects,[45] reinforced Charter application was not made a central or even significant strategic component of confronting Rule of Law backsliding by the Commission or Rule of Law friendly Member States. If its invocation was at all attempted in parallel to the Rule of Law methods, for example in coordinated infringement proceedings, this was often criticised as too narrow or too little too late.[46] This situation started to change following the successful deployment of Article 47 CFR in the *Portuguese Judges* case. Over the last two years a consistent pattern of co-application of Article 19(1) para 2 TEU on the one hand and Article 47 CFR on the other has emerged, where the Charter supplied a substantive core in the context when the TEU provision ensured that the matters related to the independence of the national judiciaries and security of judges' tenure remained firmly grounded within the scope of application of EU law. The same picture emerges from all the recent case-law of relevance, especially involving Poland.

Simultaneously, the Charter's application has acquired a potential of furthering counter-productive developments too. In the context of the newly-found competence to police national court systems' adherence to the promise of Article 19(1)(2) TEU,[47] establishing the ideal of a unified European judiciary, the Charter's role has been far from straight-forward. Indeed, every characterisation of a substantive Rule of Law problem as a problem, primarily, arising from a failure to ensure compliance with the Charter right guaranteed by Article 47 CFR tends, potentially, to significantly underestimate the negative effects of the backsliding on the ground. Looking at issues purely through the Charter lens falls short of offering the remedies even remotely similar to the one's flowing from the characterisation of *the same* problem as a violation of the Rule of Law as a principle. We have seen this in *LM*,[48] for instance, among other cases, and will discuss in more detail below. In a nutshell, remedying the breach of rights of (a group of) individuals is entirely different from remedying the national system of the judiciary's drifting away from adhering to a fundamental principle.

More generally, in substantive terms the Charter's application in other contexts, perhaps with the exception of the Court's rather recent and very significant development of the concept of 'essential core' of (some) Charter rights,[49] has very largely continued a business-as-usual for

[45] J Morijn, 'Post-Lisbon civil rights protection by the EU's political institutions' in S de Vries, H de Waele, and M-P Granger (eds), *Civil rights and EU Citizenship: Challenges at the Crossroads of the European, National and Private Spheres* (Edward Elgar Publishing 2018); J Morijn, 'Kissing awake a sleeping beauty? The Charter of Fundamental Rights in EU and Member States' policy practice' in V Kosta, N Skoutaris and V Tzevelekos (eds), *EU accession to the ECHR*, (Hart Publishing 2014).

[46] KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

[47] See the literature in note 4, *supra*, as well as M Klamert and B Schima, 'Article 19' in M Kellerbauer, M Klamert and J Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (OUP 2019) 172.

[48] P Bárd and W van Ballegooij, 'Judicial Independence as a Pre-Condition for Mutual Trust? The ECJ in *Minister for Justice and Equality v LM*' (2018) 9 NJECL 353.

[49] See special issue of the German Law Journal on Interrogating the essence of EU Fundamental Rights (2019 issue 6), particularly: M Dawson, O Lynskey and E Muir, 'What is the added value of the concept of the 'essence' of EU

human rights protection in the Union. According to the Fundamental Rights Agency, particularly the relatively narrow issue of unclear boundaries of Article 51 CFR seems to have a generalised chilling effect on trying to invoke it at all[50] – the Court's seemingly accommodating reading of the provision[51] has thus changed almost nothing in the practice of the Charter's application. Much more could be done, as András Jakab, among others, has abundantly demonstrated.[52] The Charter's application has often stumbled already at the context specific and seldom really unclear question of 'when applicable in national practice?', rather than starting from the more general and practically far more significant issue of 'what is its substantive added value?' It has been a bit like trying to promote enthusiasm for a new form of football and everyone being totally obsessed with the (admittedly quite unclearly formulated) off-side rule. For this reason one of the foremost authorities on its practical application recently wondered whether, after all, the Charter might have turned out to be little more than an 'illusionary giant'.[53]

4. Member State-Level Rule of Law Backsliding and the Charter: The Case of Judicial Independence

The problems arising from compliance with the promises of Article 2 TEU were entirely unforeseen and in any event fall fully outside the zone of the previously described shared self-perception in 'a Community based on the Rule of Law'.[54] Academics, policy-makers and, crucially, the Court of Justice have however quickly caught up with the issue of Member State-level 'Rule of Law backsliding'. Protecting judicial independence has been a case in point in that respect. A plethora of practices, patterns and proposals can by now be identified as to how to mobilise the Charter to confront that central problem. But they also show, clearly, the limitations of the Charter.

4.1 Member State-level judicial independence and the inherent limitations of the Charter's scope

As a crucial element of the ongoing fight for the Rule of Law, the principle of the independence of the judiciary is derived at EU level directly from Article 19(1) TEU, and is regarded as a vital part of the value of the Rule of Law.[55] Judicial independence thus emerged as a crucial connector between EU law and the enforcement of Article 2 TEU values outside the scope of

fundamental rights?' (2019) 20(6) GLJ 763; K Lenaerts, 'Limits on limitations: the essence of fundamental rights in the EU' (2019) 20(6) GLJ 779.

[50] FRA, 'Applying the Charter in law and policy making at the domestic level - guidance' (October 2018) <https://fra.europa.eu/en/publication/2018/national-guidance-application-eu-charter>.

[51] Case 617/10, *Åklagaren v. Hans Åkerberg Fransson* EU:C:2013:105, [2013] OJ C114/7; E Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter*: Åkerberg Fransson*' (2013) 50 CMLR 1411.

[52] A Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

[53] G von Toggenburg, 'The Charter of Fundamental Rights: An Illusionary Giant?' in A Crescensi et al (eds), *Asylum and the EU Charter of Fundamental Rights* (Editoriale Scientifica 2019).

[54] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* EU:C:1986:166, [1986] ECR 1339, para 23. Cf. D Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?' in M Adams, E Hirsch Ballin and A Meuwese (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (CUP 2017) 425.

[55] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, [2018] OJ C142/2, paras 36, 37 and 41

the *acquis sensu stricto*.[56] This explains the relative silence on the Charter as a trigger of EU's intervention among those who are busy trying to deal with the ongoing Rule of Law concerns in practice.[57] After all, Article 51 CFR still stands, all the literature on the need to move on from this competence block notwithstanding.[58] In any event, we are learning that 19(1) TEU is good enough.[59] A range of tools from pecuniary[60] to interim measures with backfiring force[61] can now be deployed to freeze at least some of the attempts of backsliding governments to undermine the independence of their judiciaries even further. Article 47 CFR has been deployed on a number of occasions, but always in the context of 19(1) TEU. It thus boasts quite unclear, 'additional', added value and showcases the natural limitations of a purely and isolated rights-based approach to policing systemic Rule of Law issues.

The role of the Charter's application in context of the Rule of Law backsliding deals mainly with Article 47 of the Charter expressing a right to an effective remedy and right to a fair trial. It requires an 'independent and impartial tribunal (…) established by the law' in order to guarantee those rights. In a broader sense however, the right to fair trial and effective remedy are designed as tools to protect other fundamental rights – e.g. privacy rights, freedom of speech or freedom of religion. Inbuilt limitation based on Article 51 of the Charter can undermine direct application of Article 47 CFR if the link with EU law is missing. The *Portuguese Judges* ruling however seemed to definitely strengthen the standard of judicial independence due to the application of Article 19 TEU, simultaneously resulting in a 'marginalisation' of Article 47 of the Charter[62] as it left just a 'supportive' role of this provision[63] due to broader scope of principle expressed in Article 19 TEU.[64] In the *Independence of the Polish Supreme Court* case AG Tanchev found that as a result of amendments to the law on the Supreme Court, Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. He argued however that Article 47 of the Charter was not applicable in this case due to Article 51 of the CFR limitation.[65] The Court disagreed and mentioned both provisions, but the clear lead was

[56] Christophe Hillion predicted this development: C Hillion, 'Overseeing the rule of law in the European Union Legal mandate and means' (2016) SIEPS Report 2016:1.

[57] L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case' (2018) 55 CMLRev 1836, 1833–1836.

[58] A Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

[59] The connection with the Charter is however obvious: Case C-619/18 R *Order of the Vice-President of the Court in Commission v Poland* EU:C:2018:852, (19 October 2018) and Case C-619/18 R, *Order of the Court (Grand Chamber) in Commission v. Poland (Independence of the Supreme Court)* EU:C:2018:1021, (17 December 2018).

[60] Especially when the backsliding Member States attempt to openly defy the Court: Case C-441/17 *Commission v Poland* EU:C:2018:255, [2018] OJ C200/20.

[61] Case C-619/18 R *Order of the Vice-President of the Court in Commission v Poland* EU:C:2018:852, (19 October 2018) and Case C-619/18 R, *Order of the Court (Grand Chamber) in Commission v. Poland (Independence of the Supreme Court)* EU:C:2018:1021, (17 December 2018).

[62] L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case' (2018) 55 CMLRev 1836.

[63] M Bonelli and M Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14(3) EUConst 622, 634.

[64] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, [2018] OJ C142/2, para 29.

[65] C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, [2019] OJ C280/9, Opinion of AG Tanchev of 11 April 2019, para 61; P Bogdanowicz, 'Three Steps Ahead, One Step Aside: The AG's Opinion in the Commission v. Poland Case' (*VerfBlog* 11 April 2019) <https://verfassungsblog.de/three-steps-ahead-one-step-aside-the-ags-opinion-in-the-commission-v-poland-case/>.

given to Article 19(1) TEU. The substantive added value of applying Article 47 CFR as well did however remain somewhat unclear.

Article 47 CFR did however play the primary role in the process of interpretation of the European Arrest Warrant system within the EU in the preliminary ruling in *LM* regarding the execution of the European Arrests Warrants requiring surrender to Poland, given the existence of a systemic threat to the Rule of Law in that country.[66] Standards of judicial independence – as stated in Article 47 CFR – were employed as factors which might (potentially) introduce exemption to the principle of mutual trust among Member States.[67] Furthermore, the Court underlined the 'protective' nature of the right to fair trial, not only with reference to other fundamental rights but also to common values expressed in Article 2 TEU.[68]

The ruling has been criticised as limited only to standards of judicial independence without reference to a broader picture of Rule of Law backsliding, in which detailed analysis of a possible breach of the right to fair trial is impractical due to systemic shortcomings of the administration of justice in a given Member State.[69] The Court confirmed – both in the *Portuguese Judges* and *LM* – that judicial independence and organisation of the judiciary at national level are not purely exclusive competence of Member States.[70] Furthermore, it is obvious that without independent courts there can be no mutual trust between Member States.[71] The threshold of the fair trial violation was set so high, however, that it might appear to be easier to postpone the surrender of a suspect in case of inhuman treatment[72] than in case of breach of the principle fair trial.[73] For that reason alone one would hope that this line of case law is still a work in progress.

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[66] Case C-216/18 *Minister for Justice and Equality v LM* EU:C:2018:586, [2018] OJ C328/22.

[67] M Bonelli and M Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14(3) EUConst 622, 634.

[68] Case C-216/18 *Minister for Justice and Equality v LM* EU:C:2018:586, [2018] OJ C328/22, para 48; A broader interpretation of use of Article 47 CFR was proposed by LD Spieker: 'Article 47 CFR translates the abstract and objective content of Article 19 (and thus incidentally of Article 2) into the domain of individual, subjective fundamental rights. This leads to a far reaching implication: Article 2 does not only become a relevant standard of review within the "triangular Solange" conception – the EU Rule of Law in its general dimension has been made justiciable through individual action. Within the frame of Article 47 CFR, an individual can address even abstract components of the Rule of Law.' (LD Spieker, 'From moral values to legal obligations. On how to activate the Union's common values in the EU Rule of Law crisis' (2018) MPIL Research Paper Series no 2018-24, 21).

[69] K Scheppele, 'Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) "Celmer" Decision' (*VerfBlog* 28 July 2018) <https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/>; W van Ballegooij and P Bárd, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU' *(VerfBlog* 29 July 2018) <https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>; Case C-396/11 *Ciprian Vasile Radu* EU:C:2013:39 [2013] OJ C86/5, Opinion of AG Sharpston, para 83.

[70] Editorial Comment, '2019 shaping up as a challenging year for the Union, not least as a community of values' (2019) 56 CMLR 3, 68.

[71] R Grzeszczak and S Terrett, 'The EU's role in policing Rule of Law: reflections on recent Polish experience' (2018) 69(3) NILQ 347, 352. - Article 19 seems to be a cornerstone of mutual trust among member states and among different judicial systems within the Member State. That is why 'it is not realistically possible for the EU to rely on national courts, in the spirit of the Simmenthal formula when those courts have been subjugated to the executive power, as in the case in Poland and Hungary'

[72] Joined Cases C-404/15 and C-659/15 PPU *P´ al Aranyosi and Robert Caldararu v. Generalstaatsanwaltschaft Bremen* EU:C:2016:198, [2016] OJ C211/21.

[73] P Bárd and W van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM' (2018) 9(3) NJECL 353, 360–361.

It seems rather a statement of the obvious that when the separation of powers is being destroyed in one of the Member States and the independence of the courts is threatened, it would be unreasonable to expect justice in individual cases from such a judiciary of such a Member State.[74] This was exactly the assumption of the Irish judge drafting the preliminary questions in *LM* (or *Celmer*, in front of the Irish courts) case. Many hopes among prominent commentators related to the idea that the Court of Justice would come up with a direct and clear assessment of the concrete threats to the judiciary of the Member State in question[75] – pretty much what it has done in *Portuguese Judges* – and rule on this basis:[76] when the whole system is compromised, indeed, it is difficult to expect a just and truly independent verdict from one particular judge whom the person with respect to whom a European Arrest Warrant has been issued will be facing. In *LM* the Court of Justice thus got an ideal opportunity to clarify the relationship between, on the one hand, the principle of mutual trust as the key principle of EU law finding its reflection in the EAW system the existence of which has to be presumed as a matter of principle, following ECJ's Opinion 2/13 – and, on the other, the imperative to safeguard the right to a fair trial as reflected in Art 47 CFR. The systemic nature of deficiencies faced by the judiciary under attack in Poland and highlighted by the referring court offered the ECJ an opportunity to go deeper into the meaning of judicial independence under EU law.

Even if *LM* was a case of big expectations in all of these regards, the majority of these promises did not materialise. This is partly due to the fact that, unlike in *Portuguese Judges*, the Court delegated the actual act of assessment to the national judge who sent the reference. The Court provided the national judge with an unworkable and largely illogical two-prong test, which puzzles plentiful national judges since that day. Moreover, the Court also obliged the judges handling EAW requests to engage in a kind of 'dialogue' with potentially non-independent colleagues in the judiciaries of the Member States experiencing attacks on the Rule of Law, 'presupposing an unlikely scenario that a captured court will admit that it was captured'.[77] The questionable nature of the very premise behind such an approach has recently been highlighted by an *Oberlandesgericht* in Karlsruhe, who, having sent the questions to Poland, decided against honouring the EAW request *without* waiting for the answers to come back, as Petra Bárd and one of us reported.[78]

[74] But see T Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: *LM*' (2019) 56 CMLRev 743, 755: 'As such, executing judges need to be careful in their individual assessment not to be prejudiced against Poland in all situations'.

[75] P Bárd and W van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM' (2018) 9(3) NJECL 353; C Rizcallah, 'Arrêt "LM": un risqué de violation du droit fundamental à un tribunal indépendant s'oppose-t-il à l'exécution d'un mandate d'arrêt européen?' [2018] JDE 348. Cf. M.Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*' (2019) 15 EUConst 17.

[76] The difference in approach exhibited by the Court in these two cases is underlined by Michał Krajewski: M Krajewski, 'Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges' (2018) 14 EUConst 792, 793–794.

[77] D Kochenov and P Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 EYCL 243, 274.

[78] P Bárd and J Morijn, 'Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU' (*VerfBlog* 19 April 2020) <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>.

4.2 Member State-level judicial independence and the inherent limitations of the rights-based approach

In the context of the limitations of the Charter's scope, it is fully understandable why the Charter approach embraced by the Court has mostly consisted in the additional deployment of Article 47 CFR alongside Article 19(1) TEU. This is because there are limitations that are linked not to the Charter's scope but to its substance in the context of dealing with backsliding. There have nonetheless been instances of Article 47 CFR being deployed alone. Rather than a positive development, however, we view this as potentially dangerous. Opting for a rights-based approach with a focus on fair trial could amount to nothing less but the failure of the ECJ to put an emphasis on where the problem lies – the systematic nature of the Rule of Law backsliding more generally.

Approached from this perspective, the view of giving precedence to Article 47 CFR is very difficult to uphold. It narrows down and downgrades the Court's function as the guarantor of justice in the context of the European legal order. Moreover, it undermines the crucial importance of Article 19(1) TEU, to say nothing of the principle of the Rule of Law as such, which is only meaningful, when it can be properly generalisable within the context of the totality of a given legal system. In addition, as one of us explained writing together with Petra Bárd in the context of the analysis of the *LM* case, where the Court, confronted with a problem of assessing the execution of a European Arrest Warrant emanating from Poland after the capture of the national judiciary has already started, the narrow view of the Court's domain failed to solve the substance of the issue at hand:

> The ECJ however constructed the case as a possible violation of a *fundamental right*, namely the right to a fair trial as protected by Article 47 EU Charter, which presupposes that tribunals are independent and impartial. The ECJ ruled that the two-step test in *Aranyosi* needs to be followed by the executing judicial authority when making decisions on surrenders. The second prong however makes the suspension of surrender almost impossible. It seems to be a disproportionate burden on the individual to show how a systemic breach if the Rule of Law affects his or her case individually (footnotes omitted, emphasis added).[79]

It is unquestionable that the norms enshrined in Article 47 CFR and Article 19(1) TEU fundamentally differ in nature[80] – and *LM* seems to pretend not to take proper notice of this fundamental difference: a right is not a principle and vice versa.[81]

This mistake will not appear new to the careful observers of the Rule of Law-related case-law of the Court of Justice. This is exactly what has occurred in *Commission v. Hungary (judicial retirement age)*,[82] where the Court sacrificed the Rule of Law opting for non-discrimination on

[79] D Kochenov and P Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 EYCL 243, 274.
[80] See also M Leloup, 'An Uncertain First Step in the Field of Judicial Self-Government' (2020) 16 EUConst 1, 19.
[81] Cf., in the context of the EU Charter, T Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 CMLRev 1201.
[82] Case C-286/12 *Commission v. Hungary* (compulsory retirement of judges) EU:C:2012:687, [2012] OJ C9/22; *cf.* U Belavusau, 'Annotation of Case C-286/12 *Commission v Hungary*' (2013) 50 CMLRev 1145; T Gyulavári and N Hôs, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts' (2013) 42 Indiana LJ 289; A Vincze, 'The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 *Commission v. Hungary*' (2013) 19 EPL 489; KL Scheppele, 'Constitutional Coups and Judicial Review: How Transnational

the basis of age instead. The Commission thus won a Pyrrhic victory and the integrity of the Hungarian judiciary was undermined. It took another case based on identical facts but coming from Poland, for the Court to upgrade its understanding of the actual issues involved.[83] In other words: Article 47 CFR may be useful as an add-on to Article 19 TEU in these types of analyses, as it underlines the logical point that a broader systematic problem logically will have an impact in each individual case to be considered. But this also directly explains why the reasoning cannot work the other way around: just stressing the human rights impact of a systematic problem automatically legally mischaracterises the problem as it disregards the wider systematic nature at hand.

Reasoning by analogy, one might expect 'another' *LM*, where the Court would actually realize that honouring an Arrest Warrant produced by the national system of the judiciary, which is *not* independent as the Court's own case-law analysed in the previous sections strongly suggests, is a violation of the Rule of Law no matter whether the suspect can make the impossible possible and connect the breach of the Rule of Law in that particular case with a violation of a very concrete right guaranteed by the Charter around which the whole idea of *LM* test evolves.

4.3 The Charter in Article 7 TEU proceedings dealing with Member State-level judicial independence

The use of the Charter not only in infringement proceedings but also in the context of assessing the state of independence of the Member States' judiciaries following preliminary references, but also in reference to Article 7 TEU procedure, was advocated as a tool to strengthen the legitimacy of those proceedings.[84] The obvious potential relevance of the Charter notwithstanding, no moves have been made by the EU institutions to this effect. It is a tool waiting to be used.

4.4 Commission's Charter-based direct actions and their potential for protecting Member State-level judicial independence

(Systemic) infringement actions create an opportunity for a creative use of the Charter[85] for the purpose of securing basic elements of Rule of Law in the European Union. Unfortunately, the previous use of Charter in infringement proceedings was rather limited.[86] Only partially

Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23 TLCP, 51; G Halmái, 'The Early Retirement Age of Hungarian Judges', in F Nicola and B Davies (eds), *EU Law Stories* (CUP 2017) 471.

[83] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, [2019] OJ C280/9. Cf. D Kochenov and P Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 EYCL 243.

[84] O De Schutter, 'Infringement proceedings as a tool for the Enforcement of Fundamental Rights in the European Union' (Open Society Justice Initiative 2017), 38.

[85] KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016); A Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

[86] M Kuijer, 'Fundamental rights protection in the legal order of the European Union' in A Łazowski and S Blockmans (eds), *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 231. The Charter has not been used even

such a situation can be justified as a result of the Article 51 CFR limitation clause. The Commission's strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (of 2010) strictly follows this logic leaving a broad space for Article 7 TEU political procedure instead of looking for a creative link with the EU law.[87] Interestingly, in 2017 the Commission announced that it would 'pursue cases in which national law provides no effective redress procedures for a breach of EU law or otherwise prevents national judicial systems from ensuring that EU law is applied effectively in accordance with the requirements of the Rule of Law and Article 47 of the Charter on Fundamental Rights of the EU.'[88] All three major infringement proceedings against Hungary recently brought before the Court recall violation of the Charter.[89] The same is the situation with the cases against Poland: the Charter is mentioned, but next to Article 19(1) TEU the Charter's Article 47 does not actually play a clear and well-articulated role.

5. EU-level Charter potential at the intersection with the Rule of Law: the example of Party Financing

It is important to stress that the EU has acted on Rule of Law backsliding not only vis-à-vis Member States *ex* Article 7 TEU. It has attempted the same vis-à-vis the knock-on effects that the same problems in the same Members have had on its own political setting. This aspect has so far quite often escaped attention. But it is crucial to draw this into the picture. Importantly, EU action in the axis of the EU level itself was modelled on Article 7 TEU in important ways. Yet, it has been highly uneven and problematic. Also, it has largely ignored the Charter even if, according to Article 51 Charter, there is really no doubt that all action by EU institutions and at EU level itself is to be fully compliant with it. As a result the extent of the problem of illiberalism for the EU, and the ways it is now deeply entrenched in complicated ways within the operation of EU institutions[90], is often underestimated.

The most important attempt to act to stem Rule of Law backsliding at EU level itself has been the recent adaptations to the Regulation on the statute and funding of European Political Parties and European Political Foundations.[91] It was attempted to strengthen existing rules that lay down the requirement that EU-funding to European Political Parties (EuPP)[92] can only be

in the Hungarian retirement age case (C-286/12). Data on use of the Charter in the infringement proceedings are not even mentioned in the Commission's annual report on application of the Charter.

[87] Commission 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM (2010) 573 final.

[88] Commission 'EU law: Better results through better application' (Communication) COM (2016) 8600.

[89] Editorial Comment, '2019 shaping up as a challenging year for the Union, not least as a community of values' (2019) 56 CMLR 3, 16-17; C-78/18 *Commission v Hungary (Transparence associative)* EU:C:2020:476, (18 July 2020); C-66/18 *Commission v Hungary (Higher Education)* EU:C:2020:792, (6 October 2020); C-808/18 *Commission v Hungary (Reception of Applicants for International Protection)* [Case in progress].

[90] R Daniel Kelemen, 'The European Union's authoritarian equilibrium' (2020) 27(3) JEPP 481.

[91] See for extensive analysis, J Morijn, 'Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond' (2019) 17(2) ICON 617; J Morijn, 'Formation and funding of European Parliament political groups, political parties and political foundations v. EU-level political rights (Case note T-118/17, IDDE v European Parliament)' in A Pahlandsingh and R Grimbergen (eds), *The Charter and the Court of Justice of the European Union: Notable Cases from 2016-2018* (Wolf Legal Publishers 2019) 257.

[92] A European political party is a political alliance of member political parties from at 25% of EU Member States (Article 3(b) Regulation 1141/2014). Its purpose is to develop a common European political agenda. A European political foundation is a think tank related to it. An EuPP is distinct from, yet linked to political groups in the EP. A

issued on the condition that in their programme and actions basic EU values (Article 2 TEU) are complied with. To this effect Regulation 1141/2014, recently further amended by Regulation 2018/673[93], introduced a registration obligation for EuPP with an independent Agency for European Political Parties and Foundation (APPF). Part of the requirement is a written pledge of allegiance to Article 2 TEU. In addition, a procedure was set up to verify continuing compliance after the moment of registration. This can be triggered by the Commission, Council and the Parliament itself. The Parliament has adopted internal Rules of Procedure (RoP) how to trigger this procedure.[94] More recently it also approved an amendment. It made establishment criteria for political groups more stringent, by including a requirement of a statement of political affinity[95] (in contrast to current rules, that state joint affinity needs no evaluation). This was clearly meant to ensure that 'illiberals' would be less likely to be successful in forming alliances while not entirely agreeing on an agenda amongst each other.

Although most attention in the negotiations was on how the verification would work, presumably for reason that there was fear that that could feed back into Article 7 TEU could be applied vis-à-vis specific Member States, what is remarkable is that the registration requirement *itself* has served as a major hurdle. Many EuPP have not registered since these rules came into force, thereby foregoing EU-funding. Those who have not registered are almost entirely in the right-wing 'illiberals' corner. The implications of the rules suggest that perhaps the requirement to be seen to endorse Article 2 TEU was itself judged politically too damaging by EuPP consisting of illiberal politicians. In this sense, arguably, the rules have been helpful in addressing (potential) Rule of Law backsliding at EU level, albeit in unexpected and unintended ways.

There are highly problematic aspects as well, however. The RoP requirement of support by at least 3 different political groups to trigger a verification request with Article 2 TEU values almost certainly serves to *protect* 'illiberals' who sit inside mainstream EuPP, such as Hungarian Fidesz that even after all the discussions and expert committees quite incredibly is still part of the European People's Party. Apparently, picking principle over power is not yet sufficiently politically attractive (or, put the other way: not acting on principle is not yet sufficiently politically damaging). As *all* mainstream EuPP have some such illiberal forces[96], it is unlikely they

political group, according to the EP Rules of Procedure (the latest version of February 2019 can be found here: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20190305+TOC+DOC+XML+V0//EN&language=EN), is a group of at least 25 Members of European Parliament from at least 25% of EU Member States. The purpose of such cooperation is access to political influence by dividing speaking times and files. EuPP and political groups are separate but connected. Most EuPP belong to political groups in their entirety. Some political groups are home to more than one EuPP. It is possible for populists not to be part of an EuPP but still to be part of a political group (non-affiliated). It is equally possible to be part of an EuPP but not of a political group (non-aligned).

[93] For extensive analysis, see J Morijn, 'Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond' (2019) 17(2) ICON 617.

[94] EP Rules of Procedure, rule 223a(2), stating the possibility of verification under the Regulation can be triggered by the EP only at the request of 25% of its members representing at least three political groups.

[95] EP Rules of Procedure, rule 32(5).

[96] The Socialist&Democrats harbour the Maltese and Romanian governing parties, Member States that were both scolded for Rule of Law related problems by majority adopted European Parliament (2014-19) resolutions. ALDE harbours the Czech ANO ruling party, which also faced majority back European Parliament (2014-19) scrutiny. Polish PiS sits in the ECR, where it cooperations with quite a few politicians that are not themselves to be categorised as illiberals but apparently have no problems to rub elbows, and base part of their own power and influence on closely cooperation with them.

would act against other mainstream EuPP. Quite simply because this would certainly cause fingers to point the other way too, and why expose their own 'bad apples'?[97] In this way the EU legislator may have actually *entrenched* the problem rather than effectively acting against the backsliding. It has come up with a solution that only hits at part of the 'illiberals' in Parliament without a real justification for why (indeed, the baddest of bad apples are unaffected by this legislation).

It is striking that the Charter played virtually no corrective or steering role in developing these rules. There is one exception. Freedom of assembly was mentioned in the Regulation to ensure that the APPF would take that into account when assessing value compliance by EuPP.[98] Remarkably, this mentioning of the Charter actually serves to *limit* the scope of the Rule of Law based limitation of access to the political arena, not as a(n additional) justification for that measure to prevent Rule of Law backsliding. This was likely in part because the measures themselves, as discussed above, were formulated in a ham-handed way and were likely to have a politically uneven effect. Is this purely Charter fetishism, or could a Charter based analysis of this type of regulation to the effect of restricting access to the political arena by political actors aiming to undermine Article 2 TEU values with a view to preventing backsliding actually make for a more fine-grained analysis? We suggest it would.[99]

For let us briefly revisit the facts presented earlier and apply a rudimentary Charter test to illustrate the point. As shown above regulation of access to the political arena is now achieved by a combination of a Regulation (adopted by the Union legislator) and the Rules of Procedure of the Parliament (adopted by the European Parliament itself, by simple majority). Arguably, as a matter of Article 52(1) Charter there can be debate about whether RoP formation requirements of European Parliament political groups, that clearly form a restriction of Article 12(2) Charter, possibly in combination with Articles 11 and 39 Charter, actually fulfil the requirement of being 'provided by *law*'. After all, the Court[100] has itself highlighted the close relationship of political groups with EuPP, which are regulated with a more stringent procedure, i.e. an ordinary legislative procedure (involving a proposal by the Commission and subsequent discussion by the co-legislators, the Council and the European Parliament). It seems a relatively straightforward observation from the perspective of the Rule of Law and democracy that a simple majority of a parliament should not be allowed to regulate *itself* which colleague political actors have access to power, without all the safeguards and input of other perspectives that a

[97] For an attempt to question this unnecessary damaging logic, and show that it is unnecessary for mainstream EuPP and political groups to rely on their bad apples, one of the current authors teamed up with the human rights NGO Liberties to visualise where "illiberals" sit in the previous European Parliament and how it was projected to be composed after the election. The project is called #vote4values tracker, and is available here: https://www.liberties.eu/en/news/vote-4-values-tracker/17019 The logic and background thinking are explained in I Butler and J Morijn, 'Tracking anti-values MEPs: EP seat projections and Rule of Law protection' (*VerfBlog* 20 February 2019) <https://verfassungsblog.de/tracking-anti-values-meps-ep-seat-projections-and-rule-of-law-protection/>.

[98] See for more extensive analysis, J Morijn, 'Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond' (2019) 17(2) ICON 617.

[99] See for more extensive analysis, J Morijn, 'Formation and funding of European Parliament political groups, political parties and political foundations v. EU-level political rights (Case note T-118/17, IDDE v European Parliament)' in A Pahlandsingh and R Grimbergen (eds), *The Charter and the Court of Justice of the European Union: Notable Cases from 2016-2018* (Wolf Legal Publishers 2019).

[100] Joined cases T-222/99, T-327/99 and T-329/99 *Jean-Claude Martinez and Charles de Gaulle v European Parliament* EU:T:2001:242, [2001] ECR II-2823.

normal legislative procedure would guarantee, nor that such an arrangement could have a direct impact on the scope and effect of Union legislation adopted by the ordinary legislative procedure.

If the currently applicable set of measures would at all clear the hurdle of 'provided by law' (which, as will be evident from the previous discussion, we doubt), it could still be seriously wondered whether another crucial aspect of Article 52(1) Charter would actually be satisfied. As was illustrated, the combination of the Regulation and the RoP as currently crafted has a very uneven effect politically – it hits some 'illiberals', but very likely not others (i.e. the most significant troublemakers in the current Article 7 TEU proceedings). This raises serious questions about whether the rules constitute a restriction of the same Charter rights that is actually proportional and tailored to the aim it is intended to achieve. This then raises the Charter analysis induced policy question: is it possible to re-design the rules of access to funding in such a way that it actually hits all political actors aiming to act contrary to Article 2 TEU values? Would it, for example, help to limit the number of Member States where MEPs should originate from (currently 25%) and/or lower the number of MEPs required to form a political group? We do not know. But these are the types of questions one weeds out if a Charter analysis is undertaken in the first place when EU-level files with a direct bearing on Rule of Law related files are negotiated at the EU-level. They seem worthwhile delving into in this case, and illustrate just how interlinked questions of Rule of Law and the Charter are. But also to what extent this is still a highly underdeveloped practice, including at the EU-level itself. It is a good example of how efforts to promote application of the Charter and to protect the Rule of Law at EU law have thus far been effectively unconnected. This should change quickly.

6. Conclusion

The EU's Rule of Law backsliding problem threatens the Union's very existence. Illiberal tendencies in an increasing number of Member States are worrying enough. But it is equally troubling that those stating their commitment to defend liberalism in the EU continue to be on the back-foot and show little sign of getting their act together. It can no longer be papered over that they have different views of the nature, extent and urgency of the Rule of Law threat, and view the problem too narrowly by singling out problems at Member State levels without acknowledging the parallel and substantive linked mirror problem at the EU level – therefore ignoring how EU level legislation and practice effectively sustains, helps entrench and sometimes deepens the problems. There is currently nothing close to a comprehensive strategy to defend liberal democracy at both Member States and EU level to act against Rule of Law backsliding in the EU. The by now discredited but surprisingly persistent self-perception of the EU as a club-of-stable-liberal-democracies is increasingly getting in the way of action by the EU to defend itself.

The Charter has only played either a virtually invisible or a negative role in dealing with Rule of Law problems in the Member States. What we call 'invisible' is the strictly supporting role – through the deployment of Article 47 CFR next to Article 19(1) TEU in the Commission's action against the clamping of the independence of the judiciary in the Member States experiencing democratic and Rule of Law backsliding. This role is invisible since the actual added value of Article 47 CFR next to Article 19(2) TEU is far from clear. The Charter here is clearly *not* indispensable, and that is likely all there is to it. Worse still, the Charter can also play a negative role, like what happened in *LM*: the Court adopted a right-based approach to a situation where

a clear and far-reaching violation of the principle of the Rule of Law was actually at stake. Conflating the breach of principle with a violation of the right has a potential to bring about long-lasting negative consequences in the context of the fight for the Rule of Law in the EU.

The potential of the Charter is not limited to these two pessimistic scenarios outlined, however. There is a world to win in applying it more forcefully, particularly at the often underexplored EU-level where there is no doubt whatsoever that the Charter is fully binding. Yet, the current practice in Rule of Law relevant EU-level legislation is remarkably bleak. As we explain by way of just one example, deploying the Charter in the context of party financing could have had far-reaching positive consequences in the fight for the Rule of Law in the EU. This should be acted upon in any subsequent changes. More generally, also in the context of putting Article 7 TEU to good use the untapped potential of the Charter is clear. For example: if the worry in Hungary is with the capture of the media, and if one agrees that even the most timid definition of EU citizens' active right to vote for European Parliament and local elections (Article 17, para 2, under b TFEU, and Articles 11 and Article 39, para 1 Charter) will logically necessitate free and independent media at Member State level in the same way that independent and impartial courts at Member State level are required in a liberal democracy, it is quite clear that there are many more Union law areas than just Article 19 TEU that could be 'weaponised' to defend the Rule of Law in tandem with applying the Charter. It is urgent to catalogue and act upon these in order to put up a better and much more comprehensive defence for the Rule of Law in the EU. In that way, the Charter is of high relevance to the on-going fight for the Rule of Law in the EU. Dismissing the instrument outright – or reducing it to a uniquely supporting role for a better deployment of Article 19(1) TEU – would be a mistake. The Charter, when used wisely, has all what it takes to become an effective instrument of values' protection in EU law. The Charter can be a weapon to help protect the Rule of Law.

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